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No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WINDWARD PARTNERS, a registered Hawaii Partnership, et al.,

Petitioners,

vs.

GEORGE ARIYOSHI, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

and

CERTIFICATE OF SERVICE

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court of Appeals for the Ninth Circuit err in affirming the District Court's dismissal of the Plaintiff WINDWARD PARTNER'S Fourth Case of Action for a failure to state a claim, in which claim it was alleged that the Plaintiffs' option to purchase real property, which was an integral part of a planned acquisition of several parcels of land, was a constitutionally secured property interest which was "taken" by the concerted actions of the Governor of the State of Hawaii and private defendants without compensation?

2. Did the Circuit Court of Appeals for the Ninth Circuit err in holding that the State of Hawaii did not waive its Eleventh Amendment immunity by Article I, §20 of the Hawaii Constitution which reads: "Private property shall not be taken or damaged for public use without just compensation.", or in alternatively holding that said constitutional provision only conferred jurisdiction to Hawaii state courts and not to federal courts?

3. In a §1983 conspiracy where state officials are protected by immunity, does the federal court retain jurisdiction over private individual co-conspirators?

4. Did the State of Hawaii waive its Eleventh Amendment immunity in Aricle I, §20 of its Constitution?

PARTIES TO THE PROCEEDINGS BELOW

1. The following are parties to the case:

Windward Partners
Harold K. Lewis
George Ariyoshi
Franklin Sunn
Tony Taniguchi
Paul Tom
Andrew Chang
Wilbert Eguchi
Lawrence Ing
David Slipher
Wayne Takahashi
Nobuyoshi Tamura
Elizabeth Loy McCandless Marks
Alan C. Kay

2. The following are present and/or former members of Windward Partners:

John I. Gonsalves
Ida Gonsalves
Kenneth Jones
GBHE Corporation
Arthur Stranske
Phyllis Stranske
Henry Felix
Michael W. C. Wong
George Rodrigues
Anthony Shannon
Michael T. Scarfone
Walter Clark
D & J Kanalee Ltd. Partnership

Frank Calistro
Pao Investment Corporation
Estate of F. Leonard Rego
Rosemary Thompson
David E. Thompson, Trustee for David Thompson, Jr.
David E. Thompson, Custodian for Michael S. Thompson
D. & J. Equipment Rentals, Inc.
Evelyn Rodrigues Pao as Personal Representative for The Estate of Joseph R. Pao
Harold Lewis
Jack Meek
Anthon Medeiros
Kenneth Sato
Mitsuyuki Kido
John Correa
Arthur Rutledge
Carl Ahlstrom
Kenneth Iha
Dean Wakefield
Virginia Quinn
Allen Hawkins
Edward Martin
George Watanabe
Jetta (Hans) Zimmerman
George Matsunaga YOY Corporation
David E. Thompson
David E. Thompson, Trustee for Susan M. Thompson
David E. Thompson, Custodian for Debra A. Thompson
Tom Way Wong
Michael N. Scarfone

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 1, 1982. The opinion of the Court of Appeals is reported at 693 F.2d 928 (1982) and is set out in the Appendix hereto beginning at page 1a. The judgment of the District Court for the District of Hawaii of

September 17, 1980, is unreported and is set out in the Appendix hereto beginning at page 18a.

JURISDICTION

The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed and entered on December 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 5 of the Constitution of the United States of America provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 11 of the Constitution of the United States of America provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment 14, Section 1 of the Constitution of the United States of America provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injuried in an action at law, suit in equity, or other proper proceeding for redress.

Article I, §20 of the Constitution of the State of Hawaii provides:

Private property shall not be taken or damaged for public use without just compensation.

STATEMENT OF THE CASE

The WINDWARD PARTNERS were purchasers and holders of an option to purchase real estate owned by Defendant ELIZABETH MARKS ("Marks"). This real estate was ultimately sold by MARKS to the State of Hawaii. The WINDWARD PARTNERS filed a complaint in federal district court requesting declaratory and monetary relief and alleging that they were deprived of their property interests in the option without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. §1983 through the joint action of Defendants MARKS, ALLAN KAY, GEORGE ARIYOSHI, Governor of the State of Hawaii and various State officials. Jurisdiction in the District Court was based on 28 U.S.C. §1331, 1343 and 2201.

On May 21, 1975, the Defendant MARKS and Pao Investment Corporation entered into a "Land Exchange and Purchase Agreement" ("Purchase Agreement") (CR 97, Exhibit A). The Purchase Agreement contemplated a series of transactions in which Pao Investment Corporation was to

acquire the interests of MARKS in lands situated in the district of Waiahole-Waikane, Island of Oahu, State of Hawaii. The Plaintiff WINDWARD PARTNERS is the successor in interest of Pao Investment Corporation (CR 97, pg. 2, 2a).

The Purchase Agreement, as modified by subsequent letter agreements, provided for the acquisition and development of MARKS' lands through five sequential exchanges (CR 97, pg. 3). For purposes of the Purchase Agreement, MARKS' lands were divided into five parcels: 1-A, 1-B, 2, 3, and 4. (CR 97, Exhibit A, pg. 2). The WINDWARD PARTNERS were unconditionally committed to purchase Parcels 1-A and 1-B, and were given an option to purchase Parcels 2, 3, and 4. Upon exercise of this option, the WINDWARD PARTNERS would become unconditionally committed to purchase Parcels 2, 3, and 4 and would have the right to acquire the parcels in any sequence they selected. (CR 97, Exhibit A, pg. 3).

The WINDWARD PARTNERS acquired Parcel 1-A and obtained an extension from

July 17, 1977, to July 1, 1978, to acquire Parcel 1-B. (CR 97, Exhibit B).

By letter agreement dated November 2, 1976, the parties agreed that Parcel 2 would be the next property acquired, subject to certain termination provisions, and that the transaction would occur by November 2, 1977, rather than July 1, 1978. The parties also agreed that Parcel 2 would be acquired at the agreed value of $6,000,000 rather than the $8,000,000 value originally stipulated. (CR 97, Exhibit D).

As an integral part of this amendment to the Purchase Agreement, Joe Pao loaned the Seller MARKS ONE MILLION DOLLARS ($1,000,000.00). (Hearing July 10, 1980, p. 28).

The letter agreement of November 2, 1976, further provided that if the WINDWARD PARTNERS acquired Parcel 2, then the WINDWARD PARTNERS would have an option exercisable by July 1, 1978, to purchase either Parcels 3 or 4. Upon exercise of this option, the WINDWARD PARTNERS would be unconditionally committed to acquire the remaining parcel. (CR 97, Exhibit D, pg. 3).

So long as the option was effective, the seller MARKS agreed not to create any lien, encumbrance, or charge upon, or transfer, assign, convey, or otherwise alienate to any third-party any interest in any parcel of the Waiahole-Waikane Properties unless expressly authorized by the Plaintiff. (CR 97, Exhibit A).

The Purchase Agreement further provided that neither party would make any public statement regarding the agreement or its subject matter without the consent of the other. (CR 97, Exhibit A, pg. 26).

On February 27, 1977, Defendant George Ariyoshi, Governor of the State of Hawaii, publicly announced that MARKS had agreed to sell Parcel 2 "under threat of condemnation" to the State of Hawaii for an agricultural park and that funds allocated to the Hawaii Housing Authority would be used. (CR 97, Exhibit E).

No condemnation proceedings were ever initiated under Hawaii Revised Statutes Chapter 359. (CR 97, pg. 4).

On May 6, 1977, Defendants MARKS and FRANKLIN SUNN, Director of the Hawaii Housing Authority, executed a "Purchase Agreement Under Threat of Condemnation"

under which the State agreed to purchase Parcel 2 for $6,000,000. Simultaneously, MARKS leased all of Parcel 2 to the Hawaii Housing Authority for seven months. (CR 97, pgs. 4, 5).

The "Purchase Agreement Under Threat of Condemnation" and the lease were entered into without any express or implied approval of Plaintiff WINDWARD PARTNERS. (CR 97, pg. 5). Because of the announcement on February 27, 1977, that the State of Hawaii had agreed to purchase Parcel 2, it became impossible for WINDWARD PARTNERS to obtain the necessary financing.

Although the original Purchase Agreement provided that the Plaintiff WINDWARD PARTNERS would be the real party in interest in any condemnation proceedings concerning the land which was the subject of the agreement (CR 97, Exhibit A, pgs. 20, 21), the WINDWARD PARTNERS were never compensated for their valuable property rights in the Purchase Agreement and thus were deprived of property without due process and without just compensation.

No answers to the complaint were filed. MARKS, KAY, and the State

Defendants filed motions to strike, to dismiss, and/or for summary judgment. The First and Fourth Causes of Action, which alleged deprivations of civil rights and conspiracy were dismissed as to all the Defendants for failure to state a claim upon which relief could be granted. The Second, Third, and Fifth Causes of Action, which alleged breach of contract, interference with contract, and contained a claim for punitive damages were dismissed for lack of jurisdiction over the claims against Defendants MARKS and KAY. The Order of the Dismissal and Judgment of the District Court was affirmed by the Ninth Circuit Court.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT AN IRREVOCABLE OPTION TO PURCHASE REAL ESTATE WAS NOT A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS AND STATE COURTS.

A specific right or interest must have the status of "property" to come within the meaning of the constitutional inhibition upon the taking of property without compensation. "Property" has

been held to include every kind of right or interest capable of being enjoyed and recognized as such, upon which it is practicable to place a monetary value. Redevelopment Authority vs. Lieberman, 336 A.2d 249 (Pa. Sup. Ct. 1975). Thus, whenever it appears that there has been a "taking" of land within the meaning of the Constitution, it is not merely the fee owner who is entitled to compensation.

The Fourteenth Amendment protects life, liberty and property from invasion by the states without due process of law. The possession of property doubtlessly implies that such property may be acquired. The right to property also includes the right to make all lawful contracts essential to acquire and dispose of property and all such contracts are entitled to the same protection as the property itself. Holden v. Hardy, 169 U.S. 366, 391 (1895). As the Court stated in Buchanan v. Warley, 245 U.S. 60, 74 (1917):

> Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose

> of it. The Constitution protects these essential attributes of property.

The holder of an option to purchase land has a conditional right to conveyance, an immunity from revocation by the option giver, and the privilege of performing or not performing the conditions at his election. During the term of the option, the holder has a right to expect that the option giver not repudiate or make performance impossible or more difficult by conveying the land to a third person.

> While the option to purchase real estate is not a sale, the optionee nevertheless does acquire the right to call for a conveyance of the land, and it has been held that this right to purchase constitutes a substantial interest in land.

Hennebont Co. v. Kroger Co., 289 A.2d 229, (Pa. Super. Ct. 1972).

In the instant case, the Court of Appeals for the Ninth Circuit, in a divided opinion, has announced a far reaching rule standing for the proposition that option holders need not be compensated if the government destroys their interests in their options. However, both State and Federal judicial

authorities are clearly divided on whether an option to purchase real estate is "property" which comes within the constitutional prohibition against the taking of property without compensation.

In In re Governor Mifflin Joint School Authority, 164 A.2d 221, 401 Pa. 387 (1960), before an option to purchase land could be exercised, the land was taken by eminent domain. The court held that the holder of the unexercised option had a valuable contract right that was destroyed and that the condemning authority was liable.

> The condemnation caused the loss of his right to elect to purchase. Surely, this must have possessed some value--it took a $9,000 down payment to secure it!

Id. at 225.

In County of San Diego v. Miller, 532 P.2d 139, 119 Cal. Rptr. 491 (1975), the Supreme Court of California held that an owner of an unexercised option to purchase real property had a right to compensation when the optioned property was taken through the power of eminent domain. It was noted that although historically courts had not granted compensation to holders of unexercised

options to purchase, that substantial exceptions had been recognized in recent years. A majority of courts now award damages to an option holder when the option is created in conjunction with a leasehold. Courts also now allow compensation to a holder of an option to renew a lease.

The California court held that the "property interest-contractual right" test was no longer determinative in questions of due process compensation:

> Instead, compensation issues should be decided on considerations of fairness and public policy. 'The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness of property law.' U.S. v. Fuller, (1973) 409 U.S. 488, 490, 93 S. Ct. 801, 803, 35 L. Ed 2d 16) "[T]he right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather than by whether his right can technically be called an "estate" or "interest" in the land.' (U.S. v. 53 1/4 Acres of Land, (2d Cir. 1943) 139 F.2d Circ. 1943) 139 F.2d 244, 247, italics added).

Id. at 143.

In applying the "considerations of fairness and public policy" approach of

the federal courts, the California court reasoned that to deny the optionee compensation would provide the optionor with an inequitable and unjustifiable windfall:

> It strips the optionee of the expected benefit of his bargained right, while relieving the optionor of his bargained duty at a point. A paramount purpose of eminent domain law is to do substantial justice. (U.S. v. Miller), (1943) 317 U.S. 369 ...).

Id. 532 P.2d at 144.

> Although the option has long been recognized in the marketplace, increased complexity and severity enhanced the importance of its use. The option has become a prevalent method for securing to a potential land buyer the ability to ultimately purchase the land--while affording him the opportunity to undertake and complete the often expensive and lengthy process of determining whether his intended use of the land will be permitted. (Cal. Real Estate Sales Transactions (Con. Ed. Bar 1967) §7.1, p. 253). Such efforts by the optionee frequently increase the value of the optioned property, although legal title remains in the optionor. Given this increased importance of the option in the marketplace, frustration of the process appears unwise.

Id. 532 P.2d at 144.

Courts in several jurisdictions have held option holders to be entitled to compensation. See United States v. 3,035.73 Acres of Land, 650 F.2d 938 (8th Cir. 1981) (option to purchase standing timber held a compensable property right.); Nicholson v. Weaver, 194 F.2d 804 (9th Cir. 1952); Land Clearance for Redevelopment Corp. v. Doernhoefer, 389 S.W.2d 780 (Mo. Sup. Ct. 1965); Texaco Inc. v. Commissioner of Transportation, 383 A.2d 1060 (Conn. Super. Ct. 1977); Sholom v. State Roads Commission, 229 A.2d 576, 246 Md. 688 (1967).

However, Courts in other jurisdictions have relied on the old "property interest-contractual right" test and have held that option holders are not entitled to compensation for the value of their interest. See City of Ashland v. Kittle, 347 S.W.2d 522, 524 (Ky. 1961) (lessees' right of first refusal to purchase the fee, not exercised prior to the taking of the property for a public use, gave the lessees no interest in the property which was compensable in a condemnation proceeding); Carroll v. City of Louisville, 354 S.W.2d 291, 292 (Ky.

1962) (holder of option to purchase real estate held to have no interest compensable in condemnation proceeding); Phillips Petroleum Co. v. Omaha, 171 Neb. 457, 106 N.W.2d 727, 734 (1960) (unexercised option to purchase did not create a compensable interest in realty in condemnation action, but was merely a unilateral contract); Cornell-Andrews Smelting Co. v. Boston & P. R. Corp., 209 Mass. 298, 95 N.E. 887, 890 (1911) (optionee held only a contract right and not a compensable part of lessee's estate in the land.)

DID A CONSTITUTIONAL "TAKING" OCCUR WHEN THE STATE ANNOUNCED PLANS TO PURCHASE REAL PROPERTY WHICH ANNOUNCEMENT EFFECTIVELY DESTROYED ALL VALUE OR PROPERTY INTEREST PLAINTIFFS HAD IN AN IRREVOCABLE OPTION TO PURCHASE THE SAME REAL ESTATE?

This Court has adopted the rule that any substantial interference with private property by which an owner's right to use or enjoyment is substantially abridged or destroyed is, in fact and in law, a "taking" in the constitutional sense. U.S. vs. Causby, 328 U.S. 256.

> [T]he Constitution measures a taking of property not by what a state says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property--without paying for the privilege of doing so.

Hughes v. Washington, 389 U.S. 290, 298 (1967).

Thus a "taking" need not involve a physical appropriation of property. Property is conceived to be the interest of the owner in the thing owned and a taking occurs if an owners' free use and enjoyment or the power of disposition are disturbed.

In the instant case, the public announcement that the State was planning to purchase the land from Marks under the threat of condemnation, the execution of the "Purchase Agreement Under Threat of Condemnation" and the development of a master plan for the land by the State, made it impossible for the Plaintiffs to finance their option.

The impossibility of obtaining financing was succinctly stated rhetorically by Harold Lewis:

> How can you sell something you don't have?

Deposition of Harold Lewis, p. 98. (CR /3, pg. 21).

The State's acts and plans resulted in impairing the commercial value of the property, made commercial financing of the acquisition impracticable, and made it impossible for Plaintiffs to exercise their option. As a further consequence, Plaintiffs were barred from acquiring other parcels of land under the Land Exchange and Purchase Agreement.

Although the State made its "Purchase Agreement Under Threat of Condemnation" with Marks "subject to" Plaintiffs' rights, that fact does not negate Plaintiffs' cause of action. Lewter vs. Dallas County, 525 S.W.2d 885 (Tex. Ct. Civ. App. 1975).

> [T]he Due Process Clause of the 14th Amendment forbids such confiscation by a State, ... no less when a taking is unintended than when it is deliberate.

Hughes vs. Washington, 389 U.S. 290, 298. (1967). The State's actions thus directly interfered and disturbed Plaintiffs' property rights. Plaintiffs'

option to purchase was destroyed and thus a "taking" in the constitutional sense occurred.

This conclusion is supported by decisions in federal jurisdictions. In Amen vs. Dearborn, 363, F.Supp. 1267 (E.D. Mich. 1973), reversed on other grounds, 532 F.2d 554 (6th Cir. Mich.), plaintiff landowners brought a class action suit alleging an unconstitutional taking by the city officials. The court held that the city's announcements and publicity of clearance projects and also its refusals to issue certain building permits, inter alia, had resulted in a taking for which just compensation was required under the fifth and fourteenth amendments.

In Richmond Elks Hall Assn v. Richmond Development Agency, 561 F.2d 1327 (9th Cir. 1977), a city redevelopment agency widely publicized a plan to develop an area in which plaintiff's building was situated. As a result of the agency's plans and actions, the plaintiff's property became unsaleable in the open market and its use for its intended purposes became severely limited. Furthermore, commercial lenders

refused to make loans on the subject property, and plaintiff's peaceful enjoyment and its right to all rents and profits from the property were substantially impaired.

The court held that a natural consequence of the agency's action was a defacto taking by inverse condemnation and indicated that the taking occurred on the date that the agency entered into an agreement with a developer to acquire the property.

> [T]o constitute a taking under the 5th Amendment, it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of his constitutional provision; it is sufficient if the action by the government involves a direct interference with or disturbance of property rights....Nor need the government directly appropriate the title, possession or use of the properties... .561 F.2d at 1330 (quoting R. J. Widen Co. vs. U.S., 357 F.2d 988).

Id. at 1330. See Foster vs. City of Detroit, 254 F. Supp. 655, aff'd, 405 F.2d 138 (6th Cir. 1968); Madison Realty Co. vs. Detroit, 315 F. Supp. 367 (E.D. Mich. 1970); Drakes Boy Card Co. vs. U.S., 424 F.2d 574 (Ct. Cl. 1979).

Under these cases, it is clear that activities other than actual condemnation can amount to a taking. However, in the instant case, the Court of Appeals held that:

> [A]nnouncement of an intent to condemn is not, in and of itself, an inverse condemnation. More direct and substantial interference with the use and enjoyment of property must be shown.

693 F.2d at 929. The Court of Appeals cited, but failed to distinguish the Richmond case which also was decided by the Ninth Circuit.

The decision of the court below therefore represents the opportunity for this Court to establish an important parameter for governmental conduct. State acquisition of property encumbered by an option to purchase will undoubtedly be a recurring circumstance. Conduct which effectively destroys all value to an option is no less a constitutional "taking" than the flight of U.S. aircraft over a chicken farm in United States v. Causby, 328 U.S. 256 (1945); than the announcements which caused a deterioration in land values in Amen v. Dearborn, 363 F. Supp. 1267 (E.D. Mich.

1973), and Foster v. City of Detroit, 254 F. Supp. 655, aff'd, 405 F.2d 138 (6th Cr. 1968); than the delay in condemning land in Drakes Bay Land Company v. United States, 424 F.2d 574, 191 Ct.Cl. 389 (1970).

Furthermore, if Plaintiffs were entitled to be compensated for the loss of their property, then Plaintiffs were also denied notice and opportunity to be heard. Walker v. City of Hutchinson, 352 U.S. 112 (1956). While Plaintiffs may not have a right to be heard on the necessity and expediency of the taking, Plaintiffs had a right to be heard on the amount of compensation which should have been paid. United States v. Jones, 109 U.S. 513 (1883).

IN A §1983 CONSPIRACY WHERE STATE OFFICIALS ARE PROTECTED BY IMMUNITY, DOES THE FEDERAL COURT RETAIN JURISDICTION OVER PRIVATE INDIVIDUAL CO-CONSPIRATORS?

The Fourth Cause of Action alleged a conspiracy between Defendant Governor Ariyoshi and private individual Defendants Marks and Kay for Marks to sell and for the State to purchase the real estate involved without compensating

the Plaintiffs, all in violation of 42 U.S.C. §1983. The dismissal of this cause of action by the District Court was affirmed by Ninth Circuit Court. If the complaint stated a §1983 claim for relief, and if the state officials were immune, the issue of whether the court retained jurisdiction over the private individual co-conspirators Marks and Kay is presented.

Under similar circumstances, this Court has held that a cause of action remains and that there exists a §1983 basis for federal jurisdiction. Dennis v. Sparks, 449 U.S. 24 (1980).

The lower federal courts faced with this issue have reached different results. In the following cases, the courts have held that a party acts under color of law within the meaning of 42 U.S.C. §1983 when acting in conspiracy with immune state officials. Kermit Constr. Corp. v. Banco Credits, 547 F.2d 1, (1st Cir. 1976); Martin Hodas v. Lindsey, 431 F.Supp. 637 (D.C. Del 1977); Bartlett v. Duty, 174 F.Supp. 94 (D.C. Ohio 1959); Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959).

The courts in the following cases have held that a private individual who conspires with a state official who is himself immune, does not act under color of law and is not liable under 42 U.S.C. §1983. Waits v. McGowan, 516 F.2d 203, (3rd Cir. 1975); Phillips v. Singletary, 350 F.Supp. 297 (D.C. SC 1972); Charlton v. Hialeah, 188 F.2d 421 (5th Cir. 1951); Kurz v. Michigan, 548 F.2d 172 (6th Cir. 1977); Griffin v. Nangle, 413 F.Supp. 913 (ED Mo. 1974).

THE COURT BELOW ERRED IN HOLDING THAT PLAINTIFFS' CLAIMS AGAINST THE STATE DEFENDANTS WERE BARRED BY THE ELEVENTH AMENDMENT.

The named governmental Defendants in the instant case were the State Governor, the Director of the Hawaii Housing Authority, and the Commissioners of the Hawaii Housing Authority. The Court below simply assumed that the action was one for the recovery of money from the State and held that the State of Hawaii was the real party in interest and that therefore the suit was barred by the Eleventh Amendment.

However, the mere fact that a suit is against a state officer does not mean

that the suit is to be considered as one against the state. It has been settled that when an officer acts under a state law in a manner violative of the Federal Constitution, he:

> ...comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Ex parte Young, 209 U.S. 123 (1908). Sterling v. Constantin, 287 U.S. 378 (1932).

Furthermore, the Court simply assumed that the damages, if any, would come from the state treasury, and that therefore the State was the real party in interest. The fact that the Hawaii Housing Authority is a corporate body was not considered although Defendant Sunn was a Director, and Defendants Taniguchi, Tom, Chang, Eguchi, Ing, Slipher, Takahashi, and Tamura were Commissioners of the Hawaii Housing Authority. See Chapter 356, Hawaii Revised Statutes; Whitten v. State University Construction

Fund, 493 F.2d 177 (1st Cir. 1974); Miller-Davis Co. v. Illinois State Toll Highway Authority, 567 F.2d 323 (7th Cir. 1977).

The suit was not barred since the State's immunity was waived in the Constitution of the State of Hawaii in Article I, §20 which provides for just compensation:

> Private property shall not be taken or damaged for public use without just compensation.

The Supreme Court of Hawaii has not interpreted this section of the Constitution with respect to this issue, however, waiver of sovereign immunity has been found by other state courts in similar provisions of their respective state constitutions. Such a constitutional provision has been regarded as a waiver of the state's immunity to suit where the state takes property without condemning it. Grant Construction Co. v. Burns, 443 P.2d 1005.

> It seems well settled that such constitutional provisions are self-executing waivers on the part of the State of its sovereign immunity. Consequently, where there is a taking of property for public

> use without a condemnation proceeding, the filing of a separate action for damages against the State by the landowner as a matter of law has been consented to by the State. This is a commonlaw remedy and depends in no wise upon the institution by the state of condemnation proceedings.

The courts of several other states have found similar constitutional provisions to be waivers: Boxberger v. State Highway Dept., 250 P.2d 1007 (Colo 1952); Anselmo v. Cox, 60 A.2d 767 (Conn. 1948); Angelle v. State, 34 So.2d 321 (La. 1948); Williams v. Walley, 295 So.2d 286 (Miss. 1974); Schumutte v. State, 22 N.W.2d 691 (Neb. 1946).

> It is a settled rule of constitutional construction that prohibitive and restrictive provisions are self-executing and may be enforced by the courts independently of any legislative action, unless it appears from the language of the provision and the circumstances of its adoption that the enactment of legislation is contemplated as requisite to put it into effect.

16 C.J.S., Constitutional Law, §49. The constitutional provision at issue here is a prohibitive and restrictive provision

and therefore should be interpreted as being a self-executing waiver.

CONCLUSION

For the foregoing reasons, the Petition should be granted and the decision below reversed.

Respectfully submitted,

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Decision of the Court of Appeals
December 1, 1982

No. 80-4509
UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

WINDWARD PARTNERS, a registered Hawaii Partnership, et al.,

Plaintiffs-Appellants,

vs.

GEORGE ARIYOSHI, Governor of the State of Hawaii, et al.,

Defendants-Appellees.

Appeal from the United States District Court
For the District of Hawaii

December 1, 1982

Before SCHROEDER, NELSON and BOOCHEVER, Circuit Judges

SCHROEDER, Circuit Judge.

Windward Partners seeks damages arising out of the purchase by the State of Hawaii, under threat of condemnation, of property on which Plaintiffs held an option to purchase. The state's purchase was expressly made subject to the option. Defendants are the owner of the purchased property, her attorney, and various state officials.

Windward's complaint alleges five causes of action. Three of these causes are based in contract and are directed to property owner Marks and attorney Kay. Both compensatory and punitive damages are sought under these claims. Another cause of action is directed primarily to the state Defendants and alleges deprivation of civil rights under color of state law, redressable under 42 U.S.C. §1983 in connection with an alleged taking of Appellants' option rights. The remaining cause of action alleges a conspiracy between the governor and Marks and Kay to announce the state's purchases under threat of condemnation in order to prevent Appellants from obtaining financing to exercise the option. Plaintiff alleges that the Defendants are liable under section 1983 for conspiracy

to deprive Plaintiff of a federally protected property interest.

We address the conspiracy count first. There is, and can be no allegation that the object of the conspiracy was to condemn the option right. In any event, Hawaii courts have never recognized an option as a compensable property interest. However, even assuming that the option was compensable interest, and assuming further that the private Defendants and the Governor conspired to make it impossible for the Plaintiff to obtain financing to exercise the option in this case, there is no authority to support the proposition that an inverse condemnation occurred.

We have been cited to no jurisdiction which had held that such a financing opportunity is a compensable property interest. Moreover, announcement of an intent to condemn is not, in and of itself, an inverse condemnation. More direct and substantial interference with the use and enjoyment of property must be shown. See Richmond Elks Hall Assn. vs. Richmond Development Agency, 561 F. 2d 1327,

1330-31 (9th Cir. 1977); Thompson vs. Tualatin Hills Park & Recreation Dist., 496 F.Supp. 530, 541-42 (D. Or. 1980). See generally, 2 J. Sackman, Nichols' Law of Eminent Domain §6.39(5) (rev. 3d ed. 1981). The conspiracy count fails to state a claim on which relief can be granted.

The district court also dismissed Windward's section 1983 cause of action against the State Defendants for failure to state a claim. Although the district court's order does not identify the particular inadequacies of the claims, it is apparent that the court did not consider Windward's option on the subject property to be a constitutionally secured interest that was taken by the state without just compensation. We find it unnecessary to reach this issue because Windward's claims against the State Defendants is barred by the eleventh amendment.

There can be no doubt that the true purpose of Windward's action is to recover money from the state treasury. Windward's failure to name the State as Defendant is therefore immaterial to the State Defendants' eleventh amendment

immunity. Edelman vs. Jordon, 415 U.S 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Ford Motor Co. vs. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945). As stated by the Court in Ford,:

> [w]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants. Id.

In spite of the fact that state officials rather than the State itself were named as Defendants, it is clear that the object and intended effect of this inverse condemnation type suit was to recover damages from the state treasury and not from the various state officials personally. See Beck vs. State of California, 479 F.Supp. 392, 396-97 (C.D. Cal. 1979). It was therefore barred by the eleventh amendment as to all the state defendants.

The framing of Plaintiff's claims as a section 1983 action does not change our conclusion. In Quern vs. Jordon, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), the Supreme Court held that

section 1983 does not abrogate or "override" the sovereign immunity of the states under the eleventh amendment.

Windward does not contest the Appellees' argument that the State is the real party in interest, that section 1983 does not limit the State's invocation of the eleventh amendment, and that the limitations of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1907), do not apply. Windward argues instead that the state has waived its immunity by Article I, Section 20 of the State Constitution, which reads:

> Private property shall not be taken or damaged for public use without just compensation.

Windward characterizes this provision as "self-executing" and, as such, establishing the State's consent to be sued.

The State Defendants correctly respond that waiver should be found "only where stated 'by the most express language or by such overwhelming implications from the [statutory] text as [will] leave no room for any other reasonable construction.'" Edelman vs. Jordan, 415 U.S. at 673, 94 S.Ct. at 1361

(quoting Murray vs. Wilson Distilling Co., 213 U.S. 151, 171 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909); Quern vs. Jordon, 440 U.S. at 345, 99 S.Ct. at 1146-47. See generally L. Tribe, American Constitutional Law, § 3-36, at 134-38 (1978). However, even assuming that the State Constitutional provision is sufficiently clear to waive immunity, the provision would confer jurisdiction only upon Hawaii state courts and would not extend to the federal courts. Kennecott Copper Corp. vs. State Tax Comm'n, 327 U.S. 573, 577-79, 66 S.Ct. 745, 747-48, 90 L.Ed. 862; Ford Motor Co. vs. Department of Treasury, 323 U.S. at 465-66, 65 S.Ct. at 351.

Because the eleventh amendment strips us of jurisdiction to consider Windward's claims against the State Defendants, we are thus unable to decide the contractual claims against the private individuals. Windward has alleged no independent federal jurisdictional grounds for those claims, and there remain no federal causes to which they may pend. See Aldinger vs. Howard, 427 U.S. 1, 14-15, 96 S.Ct. 2413, 2420, 49 L.Ed.2d 276 (1976).

Affirmed.

BOOCHEVER, Circuit Judge, dissenting:

I respectfully dissent from the portion of the opinion that holds that it was not error for the District Court to dismiss the "fourth Cause of Action" for failing to state a claim. Because I believe that it Hawaii recognizes an option to purchase land as a compensable property interest, a claim has been stated under 42 U.S.C. §1983, I would remand for the trial court to determine initially that question of state law. If the option to purchase is held to be such a property interest, the court would also have jurisdiction over the pendent state claims.

Since this appeal comes to us on a dismissal for failure to state a claim, we must accept the allegations of the complaint, which we have summarized below, as true. Halet vs. Wend Investment Co., 672 F.2d 1305, 1309 (9th Cir. 1982) (as amended). Windward secured the rights to a multi-million dollar option executed by Marks to purchase certain parcels of her land. On November 2, 1976, Windward's managing

partner, for the benefit of the partnership, loaned Marks $1,000,000 to secure an extension of time to exercise the option for parcel 2, and a reduction of its purchase price to $6,000,000. The agreement provided that Marks would not transfer, assign, convey or otherwise alienate to any third party any interest in the property as long as the option was effective. In February, 1977, Governor Ariyoshi made a public announcement that Marks had agreed to sell the land to the State under threat of condemnation. The State agreed, under that threat, to purchase parcel 2 for the $6,000,000 price previously set for Windward, with the State agreement being subject to Windward's option. No offer was ever made to Windward to compensate it for its option rights, and it was never a party to the negotiations. The announced condemnation was intended to defeat the interests of Windward. Windward, in reliance on the option agreement, expended great sums of money. The Defendants Marks and Kay acted in concert with the Defendant Ariyoshi to deprive Plaintiffs of their civil rights under 42 U. S. C. §1983. As a result of this

action, including the announced threat of condemnation, it was impossible to secure financing and Windward was unable to exercise its option.

In effect, it is alleged that there was an agreement under color of state law to deprive Windward of its right to purchase the property. By such an agreement Marks and Kay were assured of receiving the $6,000,000 instead of having to depend on the uncertainty of whether the option would be exercised, and the State avoided having to compensate Windward for its rights. The announced condemnation effectively constituted a taking of the option rights without compensation, constituting a deprivation of rights under the fourteenth and fifth Amendments under color of state law.

Assuming that the option is a property interest which required compensation, I do not think that the dismissal can be affirmed on the ground that the State's actions could not, as a matter of law, have amounted to a taking. Physical invasion of the property is not always necessary for a taking. Richmond Elks Hall Assn. vs. Richmond

Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977).

In Richmond Elks, the city announced its intent to condemn within a certain period, but after six years still had not done so. The court held that a taking occurred in 1968, before Elks suffered any physical invasion of its property, because rental income was reduced by 2/3rds, insurance premiums rose, and wide publicity of the condemnation plans made loan money on the property unavailable. Although Hawaii's agreement with Mrs. Marks stated that it was subject to the option, Windward has alleged that the State's repeated announcements of its plans to take the land rendered its option unusable. Whether the practical effect of the State's actions was to destroy the the value or usability of the option is a question of fact. If the value and use of the option were destroyed by the State action, I believe there was a taking under Richmond Elks.

I agree with the majority that action against the state officials is barred by the eleventh amendment. The Supreme Court has held, however, that a state official's immunity does not

protect alleged private co-conspirators. Dennis vs. Sparks, 449 U.S. 24, 101, S.Ct. 183, 66 L.Ed2d 185 (1980). The case concerned a judge's absolute official immunity rather than a state's eleventh amendment immunity, but the result was that a section 1983 cause of action remained against the private parties alleged to have conspired with the judge even though the state official was immune. There is therefore a basis under section 1983 for federal jurisdiction of the claims against Mrs. Marks and her attorney, Kay.

The dismissal of the complaint against the private parties may still be affirmed, however, if the option was not a property right protected under section 1983. The nature of a property interest which may not be taken without just compensation is determined by state law. Milens of California vs. Richmond Redevelopment Agency, 665 F.2d 906, 909 (9th Cir. 1982). Neither the papers filed below nor the briefs on appeal discuss whether an unexercised option is a "property interest" under Hawaii law, and the district Judge's order does not indicate that they considered that

question. Thus, the dismissal below cannot be treated as a conclusion of state law reviewable under a clearly wrong deferential standard. E.g., Major v. Arizona State Prison, 642 F.2d 311, 313 (9th Cir. 1981); Anderson vs. Allstate Insurance Company, 630 F.2d 677, 682 (9th Cir. 1980).

There are no Hawaii cases on the question of compensation for the holder of an unexercised option.[1] The older general rule is that an unexercised option right is not a property interest. The holder is not entitled to compensation for a taking when condemnation of the land destroys the value of the option. See Annot., Option-Award in Condemnation, 85 A.L.R.2d 588 (1962); 27 Am.Jur.2d. Eminent Domain §255 (1966 and Supp.1982). Cf. Nicholson

[1] After an option-holder has exercised the option, he is entitled to compensation in Hawaii if the land is taken for public use. City and County of Honolulu vs. Bonded Investment Co., 54 Haw. 385, 507, P.2d 1084, 1087, 1087 (1973). This sheds no light on the compensability of an unexercised option because the reason for compensation after exercise is that the optionee has become the actual owner of the land. Whether

vs. Weaver, 194 F.2d 804 (9th Cir. 1952) (unexercised option held by leaseholder was compensable property interest).

In United States v. 3,0535.73 Acres of Land, 650 F.2d 938 (8th Cir. 1981) an option to purchase standing timber was held to be a compensable property right. California and Pennsylvania have held

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the unexercised option was compensable under state law and theretore protected by section 1983 may depend upon whether the option was registered under the Hawaii land registration system. In City and County of Honolulu vs. A.S. Clarke, Inc., 60 Haw. 40, 587 P.2d 294, 297-301 (1978), the Hawaii Supreme Court held that a person allegedly holding an unregistered lease was not entitled to compensation after the City negotiated for and purchased the land subject to the lease. The court said that because the lease was unregistered, it was only a contractual right and not an interest in property. Id. at 300-01.

The Hawaii statutes setting up the Land Court registration system require registration of leases of more than one year, Haw. Rev.. Stat. 501-121, and allow registration of other "interests in land" without specifying whether an option may be an interest in land. Haw. Rev. Stat. 501-103. In addition, the excerpt of record in this case does not reveal whether the option was registered nor whether the particular land in this case was even subject to the Land Court registration system. Thus, Clarke is of no use in determining whether this option was a contract or a property interest under Hawaii law.

that an option held by one other than a leaseholder is a compensable property interest. County of San Diego vs. Miller, 13 Cal.3d 684, 532 P.2d 139, 119 Cal.Rptr. 491 (1975); In Re Petition of Governor Mifflin Joint School Authority, 401 Pa. 387, 164 A.2d 221 (1960). Several other states have discussed the strong policy reasons why an option-holder should be compensated when the State's action destroys its value but have not had to decide the question because the option-holder was also a holder of a more traditional interest in property, a lease. Spokane School District No. 81 vs. Parzybok, 96 Wash.2d 95, 633 P.2d 1324, 1327-29 (1981); Texaco, Inc. vs. Commissioner of Transportation, 34 Conn.Supp. 194, 383 A.2d 1060, 1062 (1977).

As the California court discussed in Miller, the no-compensation for options rule derives from an application of common law notions of property and the labelling of options as a "contractual interest" rather than an "interest in property". 532 P.2d at 143. More modern

notions of what should be protected from uncompensated takings are grounded in considerations of fairness, rather than technical determinations of what is a "property interest". See, American Savings and Loan vs. County of Marin, 653 F.2d 364, 372 (9th Cir. 1981).[2]

In conclusion, I would remand to the trial court to determine whether the option agreement constituted a compensable property interest. If that question is answered in the affirmative, a claim has been stated under 42 U.S.C. § 1983.

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[2] The District Court could decide to certify this question to the Hawaii Supreme Court.

United States District Court
for the
District of Hawaii

Civil Action File No. 78-0236

WINDWARD PARTNERS, Plaintiffs, vs. GEORGE ARIYOSHI, et al., Defendants.	)	JUDGMENT

This action came on for hearing before the Court, Honorable Samuel P. King, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that Plaintiffs' Motion for Leave to File Second Amended Verified Complaint is hereby GRANTED nunc pro tunc to the date of filing of the motion. As to the First and Fourth causes of action of the Second Amended Verified Complaint, those causes of action against the State Defendants and Defendants Elizabeth Loy McCandless Marks and Alan C. Kay are hereby

DISMISSED with prejudice. As to the Second, Third and Fifth causes of action of the Second Amended Verified Complaint, against Defendants Elizabeth Loy McCandless Marks and Alan C. Kay are hereby DISMISSED with prejudice.

Dated at Honolulu, Hawaii, this 16th day of September, 1980.

[s]

Clerk of Court

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WINDWARD PARTNERS, a registered Hawaii Partnership, et al.,

Petitioners,

vs.

GEORGE ARIYOSHI, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AFFIDAVIT OF RONALD G. S. AU

and

CERTIFICATE OF SERVICE

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No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WINDWARD PARTNERS, a registered Hawaii Partnership, et al.,

Petitioners,

vs.

GEORGE ARIYOSHI, et al.,

Respondents.

AFFIDAVIT OF RONALD G. S. AU

STATE OF HAWAII)
) SS.
)

RONALD G. S. AU, being first duly sworn on oath, deposes and says:

1. Affiant is the attorney for Petitioners in the above-entitled action.

2. Affiant was admitted to the Bar of the United States Supreme Court on

February 28, 1972.

3. On Monday, February 28, 1983, affiant caused to be mailed a Petition for a Writ of Certiorari to the United States Court of Appeals to the Ninth Circuit on behalf of the Petitioners.

4. The Petition was desposited at the United States Post Office for Hawaii with first class postage pre-paid, certified mail, return receipt requested, addressed to the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C., 20543.

5. The deadline for filing said Petition is March 1, 1983.

6. This affidavit is submitted pursuant to Rule 28.2 of the Rules of the Supreme Court of the United States.

Further affiant sayeth naught.

RONALD G. S. AU

RONALD G. S. AU

Subscribed and sworn to before
me this 28th day of February,
1983.

/s/ Jill K. Powers (seal)

Notary Public, State of Hawaii

My commission expires: 1/21/87.

CERTIFICATE OF SERVICE

I do hereby certify that on February 28, 1983, two copies of the within were served on the parties and their attorneys of record by personally delivering the same to their last known address:

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DATED: Honolulu, Hawaii, February 28, 1983.

RONALD G. S. AU

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